in any town within this State, shall have, hold and enjoy their powers and privileges, subject to be altered, restrained, extended or annulled, by the Legislature of Maine, with the *consent of such trustees, and of the town for whose benefit such fund was established.*" In this case, there was no consent.

It follows, that the "trustees of the school funds in North Yarmouth," constituted a private corporation; that they can hold and enjoy their rights and privileges under their charter, independent of legislative interference or control, except for causes which do not now appear; and that so much of the 4th section of the act to incorporate the town of Yarmouth, as provides for the division of "the school funds belonging to the town of North Yarmouth," is inoperative and void. The Constitution is imperative, that the *legislature shall pass no law impairing the obligation of contracts.* Const. of Maine, Art. 1, § 11; Const. U. S., Art. 1, § 10, clause 1.

This result renders further consideration of the merits, or of the objections, unimportant. The bill must be dismissed, with costs for defendants.

In New York Supreme Court, Monroe Special Term.

FREDERICK FOLLET *vs.* ELAM R. JEWETT AND THOMAS M. FOOTE.

1. The incongruous rule of the Courts of New York and other States, that a defendant in an action for slander or libel, might show, to rebut the presumption of malice, that he *believed* the charge when made to be true, but must not show anything *tending* to prove it true, traced to its origin in the case of Underwood *vs.* Parks, 2 Strange 1200.

2. The rule in Underwood *vs.* Parks, is shown not to be an original rule of the common law, but a departure therefrom, and a mere piece of judicial legislation. The defect in this legislation in excluding appropriate matter in mitigation, *because not pleaded,* without providing any mode in which it could be pleaded, exhibited. Also shown, how the matter was made still worse by the gratuitous adoption of another rule, viz: that pleading the truth of the charge in justification, was *conclusive* evidence of malice in the original publication.

3. Section 165 of the New York Code of Procedure, properly construed, affords a complete remedy for the evils resulting from these unjust rules.

4. The construction given to this Section, in Graham *vs.* Stone, 6 How. Pr. R. 15, disapproved, and shown to leave the matter in a worse condition than before.

5. The subject of giving evidence in actions of slander of previous *reports* of the truth of the charge in mitigation, considered; and the distinction between such evidence as bearing upon the character of the plaintiff, and upon the presumption of malice on the part of the defendant, adverted to. Evidence of this kind being admitted in England for the latter purpose, but not in the State of New York.

6. The difference in actions for libel, between cases where the libellous article is *merely* a republication of an article previously published, and where it re-asserts the charge, referring to the previous article as authority, exhibited.

7. In the former case, the prior publication may be given in evidence in mitigation—in the latter. Quere.

8. The rule in relation to striking out redundant matter under the code is, that unless *it is clear* that no evidence can properly be received under the allegations objected to, they will be retained until the trial.

9. When therefore the alleged libel contained the following: "The indictment brought against him, (the plaintiff) by his own friends, has never been answered or disproved. He stands accused of a heedless and extravagant, if not corrupt squandering of the canal funds under his control: and this we presume the Courier regards as one proof of the 'friendliness' of Mr. Follet for the canal;" and the answer set up in mitigation, that the State Auditor had made a report to the Canal Board, charging the plaintiff substantially, as charged in the libellous article, which report had been published in the newspapers of the State with comments: and that the article complained of was based upon such reports and comments, and was a legitimate commentary thereon; a motion to strike out the matter so pleaded in mitigation, as redundant, was refused.

This was an action for a libel. The plaintiff, at the time of the publication of the alleged libel, was one of the Canal Commissioners of the State of New York, and then a candidate before the people for re-election.

The defendants were publishers of a daily newspaper, in the City of Buffalo, called the Buffalo Commercial Advertiser.

The obnoxious article consisted of an elaborate editorial comment, upon a paragraph taken from the Buffalo Courier—a paper friendly to the plaintiff, and contained, among other things, the following:

"The indictment brought against him (the plaintiff) by his own friends, has never been answered or disproved. He stands accused of a heedless and extravagant, if not corrupt squandering of the canal funds under his control, and this we presume the Courier regards as one proof of the 'friendship' of Mr. Follet for the canal."

The answer set up in substance a series of official acts on the part of the plaintiff, as a justification in full of all the charges contained in the article alleged to be libellous, and then appends the following paragraph, viz: "And the defendants further answering, say, *as mitigating circumstances*, according to the statute, that before the publication of the said supposed libel, G. W. Newell, Esq., auditor, etc., made on the 25th day of August, 1852, a report to the Canal Board and the Commissioners of the Canal Fund, in and by which it appeared, among other things, that the expenditures for repairs and superintendence, on the division of the canal under charge of said plaintiff, had for the six months previous thereto increased to the amount of fifty per cent. over those of any like period of time in any former year: that said report was published in the various newspapers in this State, accompanied by editorial comments, charging the said plaintiff with incompetency and corruption, and wasteful and extravagant expenditures of the public funds; and that the said supposed libel referred to and was based upon the facts contained in the said report, and such editorial comments as aforesaid, and was a legitimate commentary thereon."

The answer then set out the same official acts of the plaintiff, not as a defence but in mitigation of the damages, and in conclusion repeats the paragraph just recited. The defendants moved to strike this paragraph relating to the report of the Auditor, from the answers in both places where it occurs, as irrelevant and redundant.

W. G. Bryan, for Plaintiff.

H. W. Rogers, for Defendant.

SELDEN, J.—This motion brings under review, the law in relation to mitigating damages in actions for oral and written slanders—a subject which has brought great and just reproach upon the common law.

The Courts have struggled with the incongruous rules which have prevailed upon this subject for more than a century, without ever having in a single instance taken the trouble to trace the difficulty to its source.

Those rules have been frequently denounced as absurd. I will refer to one instance only—in the case of *Dolloway* vs. *Turrill*, 26 Wend. 383. Senator Lee, (page 390) says—"I cannot avoid the conclusion from cases coming under my own observation as well as those appearing in the books, that the tendency of the decisions is to hedge around and protect plaintiffs in actions of slander generally, as if they were the particular favorites of the Courts; and to embarrass defendants with difficulties, as if it were desirable to prevent their giving the truth in evidence in justification."

A few passages from our own State Reports, will amply justify these remarks. In *Root* vs. *King*, 7 Cow, 613, Chief Justice Savage says, that the defendant, in an action for libel or slander—"May show in evidence, under the general issue by way of excuse, any thing short of a justification which does not necessarily imply the truth of the charge, or *tend to prove it true*, but which repels the presumption of malice arising from the fact of publication,"—(page 633).

Justice Marcy, in *Wormouth* vs. *Cramer*, 3 Wend. 395, says—"Particular facts, which might form *links in the chain* of circumstantial evidence against the plaintiff, cannot be received under the general issue in mitigation of damages."

In *Purple* vs. *Horton*, 13 Wend. 9, Judge Savage again lays down the rule as follows:—"Facts and circumstances might be shown in mitigation, when they disprove malice and do not *tend to prove* the charge, or form a *link in the chain* of evidence to prove a justification."

In *Cooper* vs. *Barber*, 26 Wend. 105, Judge Bronson holds the same doctrine. He says—"Facts and circumstances which tend

to disprove malice by showing that the defendant, through mistake, *believed the charge true*, when it was made, may be given in evidence in mitigation of damages. But, if the facts and circumstances offered *tend to establish the truth of the charge*, or form a link in the chain of evidence going to make out a justification, they are not admissible in mitigation of damages."

To me it seems that nothing could be more inconsistent than this rule. Its separate branches are directly repugnant to each other The words "facts and circumstances," as used in these extracts, do not include *rumors or reports* of the truth of the charge, or mere information to that effect, derived from other credible persons: these belong to another branch of the subject.

How, then, can we conceive of any facts and circumstances, which when proved would show that the defendant *believed* the charge when made to be true, and which would at the same time have no tendency to prove it true? There *are* no such facts and circumstances in any case. How could the defendant persuade the jury that he believed the charge, without showing some reason for that belief? The rule nullifies itself, and virtually prohibits the defendant from giving any evidence to repel the presumption of malice.

On the other hand, the plaintiff is at full liberty to give evidence of express malice, with a view to enhance the damages. This has been repeatedly held. *Defries* vs. *Davis*, 7 Car. & Payne, 112; *Bromage* vs. *Prosser*, 4 Barn. & Cres. 247; *Howard* vs. *Sexton*, 4 Comst. 157.

First then, malice is presumed from the falsity of the charge; to this the plaintiff may superadd proof of positive malice, and thus aggravate the damages, while the defendant is precluded from giving any evidence to rebut malice in mitigation. He is told that he may give evidence to show that he believed the charge to be true, provided it have *no tendency* to prove it true: that is, he may if he can, show that he believed it true, but must not show that he had the slightest reason to believe it. This is mockery.

There is not the least difficulty in tracing this absurdity to its origin, and showing precisely how it crept into our judicial system. Originally, not only any thing that had a legitimate tendency to

disprove malice, but even the truth of the charge itself might be given in evidence under the general issue, in an action of slander to mitigate the damages.

The case of *Smithies* vs. *Harrison*, 1 Lord Ray, 727, shows that such was the law at that early period, and this practice was in harmony with the general principles applicable to other cases. It never was any objection to evidence in mitigation, that under a different state of the pleadings it might constitute a complete defence.

But it seems that the practice was found liable to the objection, that plaintiffs were frequently surprised by proof, as to the truth of the charge which they had made no preparation to meet.

When, therefore, in the later case of *Underwood* vs. *Parks*, 2 Strange, 1200, which was an action of slander, the defendant offered, under the plea of not guilty, to prove the words *to be true*, in mitigation of damages, the Chief Justice refused to permit it, saying, that "at a meeting of all the judges upon a case that arose in the Common Pleas, *a large majority* of them had determined not to allow it *for the future:* but that it should be pleaded, whereby the plaintiff might be prepared to defend himself, as well as to prove the speaking of the words."

It is this little item of judicial legislation, which has created all the trouble. The embarrassment consequent upon it, has been felt from that day to the present. The object of the rule was just and right, but its effects, when operating in connection with other established rules, was not foreseen.

If after this, a defendant in an action of slander offered to mitigate the damages, by proving under the general issue, not that the words were true, but that he had when they were spoken, good reason to believe them to be true, he was met by the objection that this would violate the rule in *Underwood* vs. *Parks*.

This objection was sound. A rule which excluded evidence of the truth of the words, *if carried out*, must necessarily exclude evidence tending to prove them true. It would obviously be impossible to anticipate the effect of the evidence, and to discriminate

in advance, between such as might produce conviction in the minds of the jury, and that which would fall short of it.

Here, then, a dilemma was at once presented. The established rules of pleading would allow *nothing short* of a justification to be spread upon the record. The defendant, therefore, was prevented by *this* rule from pleading the absence of malice in mitigation, and by the rule in *Underwood* vs. *Parks*, from giving it in evidence without being pleaded.

The whole difficulty would have been obviated, if the judges, when they undertook to change a rule of the common law had foreseen, that unless they went a little farther in their legislation, and provided that defendants might plead or give notice of matter in mitigation, their rule would effectually exclude all such evidence.

In England, the Courts in some instances paying more regard to justice than to logic, held, that although a defendant could not give in evidence in mitigation, matter, which if pleaded would amount to a *justification*, he might nevertheless prove any thing falling short of it. *Knobell* vs. *Fuller*, Norris' Peake, Append. pend. 32; *Leicester* vs. *Walter*, 2 Camp. 251.

But it was manifest that this rule, and that in *Underwood* vs. *Parks*, could not stand together; and the legal profession then resorted to another expedient for avoiding the effect of the latter rule, which was, to put in a plea of justification in *all cases*, under which they introduced their evidence with a view of having it considered in mitigation.

In many of the States the Courts have followed the ruling in *Knobell* vs. *Fuller* and *Leicester* vs. *Walton*, supra; but in this State and in the State of Massachusetts, the Judges, with a logic which cannot be impugned, whatever we may think of the justice of its application, insisted, that a rule which excluded evidence of the truth of the words, must exclude evidence having a tendency to establish its truth.

This conclusion would have produced very little practical inconvenience, if they had left open the mode resorted to in England of avoiding its effect by receiving evidence going to disprove malice under a plea of justification, or rather, by considering such evidence

in mitigation, when thus given. But here arose, first in Massachusetts, and then in this State, another obstacle in the way of a defendant who was prepared to prove his innocence of all malicious intent.

It was held, that putting a plea of justification upon the record was in itself *conclusive* evidence of malice, and precluded the defendant from setting up a want of malice, or claiming any mitigation on account of its absence.

In the case of *Root* vs. *King*, 7 Cow. 613, Ch. J. Savage says: "When a defendant undertakes to justify because the publication is true, the plea, or which is the same thing, a notice of justification, is a republication of the libel. It is an *admission of the malicious intent* with which the publication was first made."

In the same case in error, 4 Wend. 114, Chancellor Walworth, (page 139,) says: "If the charge is true the defendant has another remedy by pleading the truth in bar of the action, which will be a complete defence; but if he sets up such defence which turns out to be untrue, it is a deliberate repetition of the slander on the records of the Court, and it is then *too late* for him to allege that the charge was made under a mistake."

Again, in *Purple* vs. *Horton*, 13 Wend. 9, Ch. J. Savage repeats the doctrine. He says: "Notice of justification put upon the record is evidence *conclusive* of malice. If a notice that a defendant intends to prove the truth is evidence of malice, the offer of evidence tending towards proof cannot show the absence of malice."

Thus were defendants hedged about on every side, and mitigation of damages by disproving malice was rendered impossible. If they declined to justify upon the record, their evidence could not be received, because it would violate the rule of *Underwood* vs. *Parks*, supra; and if they did so, and failed to make a complete justification, however near they might come to it, they, according to this doctrine of the Courts, only aggravated their guilt.

This was the state of the law in this State at the time of the enactment of the code.

In Massachusetts, where the same rules were adopted, the Legislature interposed long since. See Stat. of 1826, ch. 107, sec. 2,

which, after providing that a plea of justification shall not be taken as evidence that the words were spoken, proceeds as follows: "nor shall such plea of justification, if the defendant fail to establish it, be of itself proof of the malice of such words; but the jury shall decide upon the whole case, whether such plea was or was not made with malicious intent."

This statute furnished a complete remedy for the difficulty which grew out of the doctrine that a plea of justification was an admission of malice; but it left the rule of *Underwood* vs. *Parks* in full force, without the obvious relief which a simple provision that a defendant might plead or give notice of matter *in mitigation,* would have afforded.

This brings me to the remedy which the code has provided. Sec. 165 reads as follows: "In the actions mentioned in the last section, (libel and slander,) the defendant may, in his answer, allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not, he may give in evidence the mitigating circumstances."

How was it possible to devise a provision more exactly adapted to meet and remove the embarrassments which we have seen existed? The omission in the rule of *Underwood* vs. *Parks* is supplied, and the doctrine, obviously unsound in regard to the effect of a plea of justification, abrogated.

In the case of *Graham* vs. *Stone*, 6 How. Pr. R., 15, Justice Johnson was called upon at special term to give a construction to this section. In the general tone and spirit of his decision in that case I cordially concur: but I am unable to assent to either of the positions, 1st, that mitigating circumstances must necessarily be pleaded *in connection with a justification*, or 2d, that the section was not intended to admit any evidence in mitigation which was not admissible before. If this construction is sustained, one of the most highly remedial provisions which the code contains, is rendered nugatory.

The answer before us was obviously drawn to meet the doctrine

of this case, and hence the incorporation of the mitigating matter sought to be expunged with the matter set up as a justification.

But I cannot concur in the construction given in *Graham* vs. *Stone*, for another reason. If the complaint is verified, the defendant could only plead in mitigation in cases where, at the time of putting in his answer, he could conscientiously swear to his belief of the truth of the charge. This would leave the subject in a worse condition even than before the code, when defendants could plead a justification, and thus introduce their mitigating evidence, which the jury in most cases would not fail to consider, notwithstanding the charge of the judge to the contrary.

There is nothing in the language of sec. 165 which imperatively calls for the interpretation given to it in *Graham* vs. *Stone*. I feel constrained, therefore, to hold that matter in mitigation may be pleaded either with or without a justification; but if with a justification, it should be pleaded separate from, and not as a part of it.

The consequence of this conclusion is, that the paragraph objected to where it occurs as a part of the defence set up by way of justification, is redundant, and must be stricken out.

The other paragraph is well pleaded, provided the matter alleged is such as can properly be received in mitigation of damages.

This brings us to another question about which much confusion has prevailed.

In actions of slander the attempt has often been made to mitigate the damages by proving that the defendant did not originate the charge, but that reports of its truth were current before; and in actions for libel, that the charge had been taken from some previous publication.

Much embarrassment has arisen from the want of proper discrimination as to the object of this evidence. Reports unfavorable to a plaintiff may be offered for either of two purposes: To prove the character of the plaintiff to be bad, or to repel the presumption of malice. It is evident that these two modes of diminishing the damages are entirely distinct in their nature, and yet the cases in regard to this kind of proof treat them indiscriminately; and hence the confusion on the subject.

The English Courts, which have sometimes admitted evidence of prior reports, have been charged by the Courts of this country with a departure from the universal principle, that wherever the character of a party is assailed the evidence must be confined to *general* character.

This charge, however, is founded upon a misapprehension of the object for which the proof was received; which was, in most instances, merely to show that the defendant had some reason to believe the charge to be true, and thus repel to a greater or less extent the inference of malice.

But there may be good reasons why this species of evidence should not be received, even for the latter purpose. It must be regarded as settled in this State, that it cannot be, although the Courts have neglected to consider the distinction adverted to, between the proof as bearing upon the character of the plaintiff, on the one hand, and upon the malice of the defendant on the other. (*Mapes* vs. *Weeks*, 4 Wend., 659; *Inman* vs. *Foster*, 8 Wend. 602.)

The rule is the same in Massachusetts. (*Wolcott* vs. *Hall*, 5 Mass., 514.)

Again, there is another distinction which has been frequently overlooked. To make a charge because others have made it, depending upon them for its truth, and referring to them as authority, is one thing; and simply to assert that others, naming them, have made such a charge, is another and quite different thing. In the latter case, I do not hesitate to say, that proof that the persons named have made the charge, is admissible in mitigation, even if it be not prima facie a defence.

But the question with which we have more immediately to do is, how far a publisher of a newspaper may be permitted to show, by way of disproving malice and mitigating damages, that the libellous matter was not original, but was either a literal or virtual republication of a charge previously published.

This subject is now stripped, by the section of the code to which I have referred, of the technical difficulty which embarrassed the Court in the cases of *Cooper* vs. *Barker*, 26 Wend., 105, and

Cooper vs. *Weed and others*. See Wend. Introduction to Starkie on Slander, p. 38.

The question can now, therefore, be considered upon its intrinsic merits. It seems, then, to me, palpably absurd to hold that there is no difference between the case of one who, under the promptings of his own malignancy, coins and gives currency to a false and libellous charge, and one who merely reiterates what he finds already published to the world, as true.

There is, I think, no doubt, that where the publisher gives the charge *as a republication*, and uses no language of his own which in any way *asserts its verity*, he may plead and show in mitigation that it was in truth a republication. But where the second publisher assumes to assert the charge himself, and merely refers to the previous publication as his authority, a different question arises, upon which I will not now express an opinion.

There is still another question, and that is, whether, in order to admit the proof where it is admissible at all, the reference to the previous publication must not be definite and certain, so as to point out precisely where it is to be found.

These are grave inquiries, most of which will be found to a greater or less extent involved in this case when it comes to be tried.

The rule in regard to striking out redundant matter is, that unless *it is clear* that the facts and circumstances alleged cannot properly be received in evidence, it will be retained until the trial. I am not prepared to say that it is entirely clear, that the matter objected to here may not, under some possible state of the proof upon the trial, be admissible in mitigation of the damages, and must therefore refuse the motion to strike out the paragraph where it occurs secondly in the answer.

Motion refused.